SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 475

DAN PAUL,

Petitioner,

vs.

DADE COUNTY, FLORIDA, by its Board of County Commissioners acting as the DADE COUNTY PORT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE AND BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS

The question as stated in the Petition is patently argumentative and should be rephrased as follows:

Whether due process and equal protection of the laws are denied any taxpayer when the County exempts from County ad valorem taxation certain airport facilities constructed and owned by the county and leased to a commercial airline for use by that airline in carrying out certain airport related activities which have been defined by the State Legislature of Florida as activities primarily serving municipal or public purposes.

An additional question presented is: Whether this Court has jurisdiction to review the judgment of the Florida Supreme Court on the basis that a decision on the application of the equal protection and due process clauses of the Fourteenth Amendment was not necessary for the judgment rendered.

STATEMENT OF THE CASE

The Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority (Authority), on October 16, 1967 adopted Resolution No. R-1233-67 authorizing the issuance of Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) in the face amount of $34,640,000, for the purpose of providing funds for constructing a new aircraft maintenance apron, a kitchen for the preparation of inflight meals, two employees' parking structures, a new aircraft hangar, an administration facility and a utilities center, and certain improvements to existing buildings, on Miami International Airport property leased by the Authority to National Airlines, Inc. (National) by a Lease Agreement dated as of October 1, 1952, as amended. (R. Vol. I, 139)

The bonds were authorized and were issued after the decision of the Florida Supreme Court holding that they were lawful and valid in all respects. Pursuant to the provisions of a Supplemental Agreement between the Authority and National, dated as of July 1, 1967 (R. Vol. I, 99-138), the foregoing facilities have been leased to National at the rental provided for in the Supplemental Agreement, which contains, among

others, the following provision at issue in this case (R. Vol. I, 131-132):

> "No rentals, fees, licenses, excise or operating taxes, tolls or other charges except those expressly provided in this Supplemental Agreement, and charges for utilities mentioned in the Lease Agreement, shall be charged by the Authority or collected from, directly or indirectly, National for any of the facilities, rights, licenses and privileges granted by this Supplemental Agreement. It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay any and all taxes or improvement charges of any nature whatsoever which may be levied or assessed against the New Facilities, or the leasehold interest of National therein."

Pursuant to the provisions of Chapter 75, Florida Statutes, the County of Dade, Florida, by its Board of County Commissioners acting as Dade County Port Authority, on October 18, 1967 filed its Petition for the validation of the bonds. The Petition incorporated the Lease Agreement of October 1, 1952, as amended, the Supplemental Agreement and the bond resolution (R. Vol. I, 1-11). The Petition named as Respondents the "State of Florida and the Several Property Owners, Taxpayers and Citizens of Dade County, Florida, including Non-residents Owning Property or Subject to Taxation Therein, and Others Having or Claiming Any Right, Title or Interest in Property to be Affected by the Issuance of the Bonds Herein Described, or to be

Affected in Any Way Thereby." On November 14, 1967, there was filed in the proceeding the "Answer of Respondent Dan Paul" (R. Vol. I, 155-158). On the same date the matter came on for hearing, and on November 27, 1967, the Circuit Court entered its Decree validating and confirming the bonds, the Lease Agreement of October 1, 1952, as amended, the Supplemental Agreement and the bond resolution (R. Vol. I, 159-168; Appendix to Petition, A32-A42).

On appeal by Respondents, the State Attorney and Dan Paul, the Supreme Court of Florida affirmed the Decree of the Circuit Court, three of the seven Justices dissenting, one (Justice Drew) with opinion (Appendix to Petition, A1-A26). Under Florida Statutes the State Attorney is required to oppose the Petitioner in all bond validation proceedings.

FLORIDA SUPREME COURT DECISION

In its decision in this case the Florida Supreme Court held:

1. The facilities to be constructed by the County and leased to National served a public purpose primarily. (Appendix to Petition, A2).

2. The decree validating the bonds and the Supplemental Agreement did not violate Section 10, Article IX, of the Florida Constitution, which Section provides that the credit of the State or of any county, city, borough, township or incorporated district shall not be loaned to any corporation, association, institution or individual (Appendix to Petition, A2-A3).

3. The Supplemental Agreement does not violate Sections 1 and 5 of Article IX and Section 16 of Article XVI of the Florida Constitution (Appendix to Petition, A4). (Note: the reference to Article XV in the printed Opinion, 210 So. 2d 200, 202, and in Appendix to Petition, A4, is erroneous.) For the information of the Court, the Sections referred to provide in pertinent part as follows:

"Article IX.

"Section 1. The Legislature shall provide for a uniform and equal rate of taxation, . . ."

"Section 5. The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation . . ."

"Article XVI.

"Section 16. The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the Legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, education, literary or charitable purposes."

4. The inclusion in the undertaking of parking facilities, a restaurant and training school was for a public purpose (Appendix to Petition, A6).

5. The financing as shown by the record is consistent with the law of Florida and in no way is it inconsistent with the Constitutions of the State of Florida or the United States (Appendix to Petition, A6).

ARGUMENT OF RESPONDENT

1. *This court does not have jurisdiction to review the judgment of the Florida Supreme Court in this case, as a decision on the application of the equal protection and due process clauses of the Fourteenth Amendment was not necessary to the judgment which rested on independent and adequate state grounds.*

As Justice Jackson stated in *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463, "This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." See also *Murdock v. Memphis*, 20 Wall (87 U.S.) 590.

The judgment of the state court which it is sought in this proceeding to have reviewed by this Court was entered in a validation suit brought under the provisions of Chapter 75, Florida Statutes, by the County of Dade, Florida, by its Board of County Commissioners acting as Dade County Port Authority, for the purpose of determining the validity of the bonds and the proceedings therefor, including the Supplemental Agreement. The question of exemption from taxation of the airport facilities financed thereby or of the leasehold interest of National was not a matter which could

be properly raised and adjudicated in the validation proceedings. In *State v. City of Miami*, 103 So. 2d 185, the appeal was from a decision of the Circuit Court upholding the validity of Water Revenue Bonds of the City and holding that the property of the waterworks system of the City, including the portion outside the City limits, was exempt from all taxation. The Court held that the question of tax exemption was a collateral matter not subject to adjudication in a validation proceeding, the sole purpose of validation proceedings being to put in repose any question of law or fact that may be subsequently raised affecting the validity of the bonds. The Florida Supreme Court reversed the portion of the Circuit Court decree finding that all of the property of the waterworks system of Miami was exempt from all taxation and directed that such portion be deleted from the decree.

Among the numerous Florida decisions mentioned by the Court in its opinion in *State v. City of Miami*, supra, was *State v. City of Miami*, 116 Fla. 517, 157 So. 13, 16, a validation proceeding in which it was sought to have disposed of a question as to the validity of the bond resolution provision that no taxes should be imposed by the City upon the bonds. The Florida Supreme Court in its opinion said:

> "But we are not here concerned with this question, as it is one which can only be raised in a direct proceeding relating to the taxation of the bonds . . . So whether this provision exempting the bonds from taxation is valid or invalid, it cannot be questioned in this pro-

ceeding, and the determination of that question would not affect the validity of the bonds."

In the instant case the opinion of the Court made no mention of tax exemption in upholding the validity of the bonds and the Supplemental Agreement, which was all it had authority to do in the validation proceeding under the validation statute. The matter of tax exemption was a collateral matter which should be raised by any party considering himself aggrieved in a direct proceeding relating to such tax exemption. Such forum is and has been open to Respondent Paul. Whether the property or the leasehold interest of National therein is tax exempt or not does not affect the validity of the bonds or the means provided for their payment.

In upholding the validity of the Supplemental Agreement the Florida Supreme Court upheld the document as a whole, which includes the following provisions:

A provision that the obligation of National to pay rent to the Authority sufficient to pay interest and principal and sinking fund requirements of the bonds is absolute and unconditional (R. Vol. I, 112, Art. VI).

A provision that National shall not cancel or terminate the Supplemental Agreement for any reason whatsoever as long as any of the bonds here involved remain outstanding (R. Vol. I, 126, Art. XVIII).

The provision that is the basis of Petitioner's application for a writ of certiorari on the grounds that

it denies equal protection of the laws, which reads as follows:

> "It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay all taxes and improvement charges of any nature whatsoever which may be levied and assessed against the New Facilities, or the leasehold interest therein." (R. Vol. I, 132, Art. XXI)

The provision that the provisions of the Supplement Agreement are severable, and that if any of its provisions should be held to be unlawful by any court of competent jurisdiction the decision of the court would not affect or impair any of the remaining provisions (R. Vol. I, 133, Art. XXV).

It will be noted that in the quoted provision of Article XXI the Authority agrees to assume and pay taxes and improvement charges levied against the undertaking or the leasehold interest of National therein only "if not prohibited by law". In other words, if such assumption and payment should be unlawful for any reason, including a denial of equal protection of the laws, the Authority would be under no obligation to make any such assumption or payment and no one's right, constitutional or otherwise, would be violated.

Furthermore, if the Authority should at any time threaten or undertake to assume and pay taxes levied against the undertaking or the leasehold interest of National and, in a proper proceeding, the Article XXI provision should be declared invalid for any reason,

that provision would be exscinded pursuant to Article XXV and the absolute obligation of National under Articles VI and XVIII to pay rent for debt service and sinking fund requirements would not be affected or impaired.

It is clear from the foregoing that in validating the bonds and the Supplemental Agreement no decision on the appplication of the equal protection and due process clauses of the Fourteenth Amendment was necessary, and that the judgment of the Florida Supreme Court rested on independent and adequate state grounds.

2. The property here involved, owned by the County of Dade and leased to National, is immune from taxation and therefore the equal protection and due process clauses of the Fourteenth Amendment have no application.

The Florida Supreme Court, in *Park-N-Shop, Inc. v. Sparkman*, 99 So. 2d 571, held that county-owned property is immune from taxation. This case involved a block in the City of Tampa owned by Hillsborough County which had been leased to certain individuals for a period of 5½ years for use with an option to purchase on specific terms. Among the provisions of the lease was one that "no ad valorem taxes whatsoever (County or City)" should be levied against the property (with a provision that if a building should be erected on the property the building should be taxed). The appellants in the case charged that the block was being used by the private individual lessees for commercial uses that competed with other businesses, and competed unfairly

because the operators using the property were relieved of taxes while those who competed with them had to carry their share of the tax burden.

In its opinion the Court said, in part:

> "If seems from the decisions of this court and those of other jurisdictions that the criterion in determining the taxable character of property is the nature of the use to which it is put and not the ownership. (Citing cases) But these decisions are of no assistance because the primary problem is whether or not a tax may be levied on property of the county . . .
>
> "After a careful study of appropriate provisions of the Constitution and the statutes we decide that property of the state and of a county, which is a political division of the state, Sec. I, Article VIII, is *immune* from taxation, and we say this despite the references to such property in Sec. 192.06 (1) and (2), supra, as being exempt. As we have shown in quoting the provisions in the Constitution dealing with county taxes, the inhibitions were aimed at the expenditure for other than county purposes of taxes raised by counties."

Then, referring to the provision in the lease that no county or city ad valorem taxes should be levied against the property, the Court said:

"Feeling that the property of the county was immune from taxation we decline to hold that it should assess taxes against its own land, pay the money to itself, then surcharge the lessees for the amount on the theory that the so-called tax exemption provision of the lease was illegal . . . ."

"We are puzzled by the attempt of the county to relieve the lessees of the payment of city taxes, but certainly the city could not, as the county could not, assess county property for taxation . . ."

In the recent case of *Hillsborough County Aviation Authority v. Walden*, 210 So. 2d 193 (rehearing denied June 5, 1968), the Florida Supreme Court had occasion to consider directly the bearing of its decision in *Park-N-Shop, Inc. v. Sparkman*, supra, on the taxability of a leasehold interest in property owned by a county, and held that the immunity from taxation of Hillsborough County did not extend to the leasehold interest of a motel corporation using the property for a predominantly private purpose. However, it held in this case that the use by a lessee of property owned by the Hillsborough County Aviation Authority for restaurant purposes was predominantly public in nature, any use for private purposes being only incidental to the predominant public use, and that therefore the tax exemption afforded the property of the Authority extended to the leasehold interest.

Since the use by National of the airport property here involved is, and has been held by the Florida Su-

preme Court to be, the performance of a public function for the use and benefit of the public, the immunity of the County from taxation extends to the leasehold interest of National, and the equal protection and due process clauses of the Fourteenth Amendment have no application.

3. In any event and without regard to any of the principles and conclusions stated above, exemption from taxation of the airport property leased to National and the leasehold interest therein is lawful and does not contravene the equal protection and due process clauses of the Fourteenth Amendment.

The limitations imposed by the Fourteenth Amendment on exemption from taxation of the types here involved may be summarized as follows: The due process clause of the Fourteenth Amendment requires that governmental resources be devoted to public purposes. When private ends are advanced by the use of governmental resources, the private benefit must be incidental only to the overall public objective and purpose. In so far as the equal protection clause of the Fourteenth Amendment is concerned, any tax exemption favoring one particular segment or group must not be arbitrary or unfairly discriminatory. The tax exemption here involved is within each of these limitations.

The financial arrangement between the Authority and National was held by the Florida Supreme Court to be for a public purpose, to which holding the Petitioner has not taken exception.

Any private benefit to National is incidental to the overall public objective or purpose. In this connection the Florida Supreme Court said:

> "Objection is made because National is to have the exclusive use and control of this facility and that they will not doubt earn profits on the same. It is quite obvious that National must make a profit to stay in business. It is a well-known fact that they are not running a great airline as an eleemosynary institution. On the other side the Authority has an obligation to avail itself of competent and dependable agencies such as National, as chosen in this case, to perform this public function for the use and benefit of the public. It would seem to follow that National must of necessity have control of the premises upon which they are paying the lease."

(Appendix to Petition, A6)

Classifications for tax purposes based upon transportation facilities are valid. *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369, 60 S. Ct. 968 972: ". . ., so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, . . ."

The tax exemption of the airport property here involved is reasonable and is constitutionally permissible. This Court said in *Allied Stores v. Bowers*, 358

U.S. 522, 528, 79 S. Ct. 437, 441: ". . ., it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the equal protection clause of the Fourteenth Amendment." Here the Florida Supreme Court found that a purpose of the financing was the continued development of the Miami International Airport (Appendix to Petition, A2).

CONCLUSION

It is submitted that the Petition for a Writ of Certioari should be denied for the following reasons:

(1) This is not a case subject to review by this Court, since it is a validation proceeding in which there is and can be no determination as to the legality of any tax exemption granted. The judgment of the Florida Supreme Court was based on independent and adequate state grounds, and a decision on the Federal question raised by Petitioner was not and is not necessary to sustain the State Court's judgment.

(2) The property involved, being property of a county which is a political division of the State, is immune from taxation, both as to the county and its lessee, and hence is not subject to constitutional requirements for exemption.

(3) Any tax exemption here involved does not in

any event contravene the equal protection and due process clauses of the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was served by mail upon MESSRS. PAUL and THOMSON, Attorneys for the Petitioner, 1314 First National Bank Building, Miami, Florida this 21st day of October, 1968.

William D. Gillis

General Counsel for Respondent